(26)

No. 96-1578

In The

Supreme Court of the United States

October Term, 1997

HON. THOMAS R. PHILLIPS, HON, RAUL A. GONZALEZ, HON. NATHAN L. HECHT, HON. JOHN CORNYN, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, HON. PRISCILLA OWEN, HON. JAMES A. BAKER, HON. GREG ABBOTT, In Their Official Capacities As Justices of the Texas Supreme Court; TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; and W. FRANK NEWTON, In His Official Capacity As Chairman Of The Texas Equal Access To Justice Foundation,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, and MICHAEL J. MAZZONE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Texas IOLTA program funds the Texas Equal Access to Justice Foundation to enhance the provision of civil legal services to the state's indigent population. The only funds eligible for deposit in an IOLTA account are those that are incapable of earning net interest for the client. If there is any legally and economically permissible way to earn net interest for the client, Texas lawyers are obligated to do so. Lawyers are free to use any potential pooling or subaccounting services that are actually available to earn net interest for the client. If the lawyer reasonably believes that the funds are not capable of generating net interest, IOLTA requires the funds to be deposited into an aggregated IOLTA account with the principal available for return to the client on demand. If there is any doubt about where funds should be placed, the State Bar of Texas widely advertises a toll-free phone number to answer any IOLTA-related question a lawyer might have. *See* Tex. B. J., Nov. 1997, at 1079. As was true before changes in federal banking law made IOLTA possible, the decision whether to advance funds to a lawyer is left to the client and lawyer, and in some cases, a third party who might demand some form of escrow as part of a transaction.

Neither the requirement that Texas lawyers maintain IOLTA accounts nor the designation of the Texas Equal Access to Justice Foundation ("TEAJF") as the recipient of the IOLTA funds infringes the property interest of any Respondent. Rather, this case presents the narrow question of whether interest earned on IOLTA accounts is "property" belonging to those clients who have surrendered to their lawyers funds incapable of generating net interest on their own. Fifty states have adopted IOLTA programs on the premise that a client is not denied any property where net interest income is only possible as a

result of the efficiencies of aggregating funds from multiple clients in an IOLTA account. Two federal circuits have agreed. Only the Fifth Circuit panel *a quo* has found IOLTA proceeds to be "property" of clients whose trust deposits could not earn net interest outside of IOLTA.

But to read the brief of Respondents, one would conclude the issue is whether the federal courts should scrutinize the Texas IOLTA program for perceived defects in the manner in which Texas established and operates the IOLTA program. That Respondents' objections do not rise to a constitutional dimension is apparent from the complete absence of any effort to show how any of these three Respondents have suffered the slightest injury as a result of the Texas IOLTA program. And that absence of injury is the direct result of the record made in the district court where Respondents conceded they would not be one penny richer if IOLTA did not exist.[1] Because Respondents have not shown any cognizable property right and have also failed to establish that the Texas IOLTA program injured them in any identifiable way, the judgment below should be reversed, and the district

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[1] Respondents' own recognition that the record they made in the district court is of no help to them can be seen from the fact they cite the affidavit of the plaintiff Summers only on page 8 of their brief, they cite that of plaintiff Mazzone on the same page and on page 47, n.18 for a point unrelated to their claim of direct injury to Respondents' property, and they never cite to any record evidence to support the claim of the Washington Legal Foundation. In a similar vein, they refer to the opinion of the court of appeals only in their description of the proceedings below (Resp. Br. 8-9) and never rely on any of the arguments made by that Court in order to defend the judgment below. Given Respondents' apparent abandonment of the Fifth Circuit's rationale, Petitioners see no reason to respond further to most of what the Fifth Circuit said, although this reply does respond to two pithy phrases that cannot be defended. *See infra* 10 & 15 n.9.

court's decision, entering judgment dismissing the complaint, should be reinstated.

NO PROPERTY RIGHT OF ANY RESPONDENT HAS BEEN VIOLATED.

While Respondents strain to fit their tenuous First Amendment objections into the context of a takings claim, to have a legal claim of any kind, Respondents must show they have been deprived of some property belonging to them. Their so-called First Amendment claim, based on the *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) line of cases, which is not part of the question presented under this Court's Order of June 27, 1997, depends on some use of their property (union dues in those cases; allegedly lost interest here) in a manner that offends the beliefs of the property owner. Thus, the first hurdle Respondents must overcome is to show, on this record, that they have been deprived of some recognized property right that belongs to them. This they have utterly failed to do.

Not even a plausible argument exists for two of the three Plaintiff-Respondents: Washington Legal Foundation and attorney Michael Mazzone. The former is a nonprofit corporation located in Washington D.C., with no Texas offices or bank accounts. WLF does not even pretend to have an affected property interest of its own. There is no showing in this record that any of its other members or supporters have lost any property, even to the degree claimed by Mazzone and Summers. Hence, WLF simply has no claim arising from the operation of the IOLTA program. Mazzone likewise cannot claim a property right in proceeds generated by IOLTA. There is no dispute that all of the client's principal, whether in an IOLTA or other trust account, must be held for the client and surrendered on demand, and Texas law, undisputed

here, forbids a lawyer from making any profit from trust funds given to him by a client. Thus, WLF's and Mazzone's claims were both properly dismissed; neither had a claim on the merits or any justiciable injury stemming from the operation of the Texas IOLTA program. *See Lewis v. Casey*, 116 S. Ct. 2174 (1996).

That leaves only the client Summers. But he fares no better. One of Summers' problems is the utter lack of evidence he actually lost money that would have been paid to him but for the Texas IOLTA program. He attempts to sidestep this problem in two ways: first, he argues that the Court need only examine whether interest will be earned on his funds, which he claims would belong to him. He further claims that the Court, in making this examination, should disregard the inevitable costs associated with earning that interest in determining whether his property rights have been violated. This first argument is based on the fallacy that a person's prospective interest in property can be determined by examining only the positive gains and disregarding the costs. Second, he argues there are ways in which clients generally are able, with the aid of computers and friendly bankers, to earn net interest and that IOLTA interferes with their doing so. This second argument is precluded by, among other things, the absence of any factual basis in this record to indicate Respondent Summers (or for that matter any other Texas client) could have earned any net amount on any IOLTA deposit.

A. In Determining Whether A Property Interest Exists, The Court Must Consider The Cost of Acquiring the Property.

The bulk of Respondents' brief (pp. 12-35) is devoted to an attempt to persuade the Court that a person may suffer a constitutional deprivation of "property," even if the cost of acquiring that property is greater than its resulting value. It makes no difference, according to

Respondents, that Summers could not have realized this interest because the costs, outside of the IOLTA program, would have exceeded that income. Respondents' argument fails as a matter of both economics and law. At bottom, even under the broadest understanding of the term "property," that phrase is understood to relate to "a thing of value." *E.g.*, Tex. Tax Code Ann. § 1.04(5) (Vernon 1992).

1. Respondents' argument fails to account for any costs that would be incurred to generate the interest Summers claims.

Analysis of the existence *vel non* of a "property" right cannot turn on whether there is a benefit without regard to the attendant costs. Rather, "the expectations protected by the Constitution are based on objective rules and customs *that can be understood as reasonable by all parties involved.*" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (emphasis added). No reasonable person considers a transaction without regard to the costs associated with it. Investment-backed expectations are based not only on the potential for prospective gain but also on the economic reality that there is, in fact, some cost in making an investment.

The first premise of IOLTA is that if a client's funds are capable of generating a net benefit to the client the funds do not belong in an IOLTA account. It is only when the funds cannot be invested to benefit the client that IOLTA steps in and asks whether any other benefit can be realized. Even then, contrary to Respondents' assertion (Resp. Br. at 35), the funds may be placed in a non-IOLTA account if a lending institution offering IOLTA accounts is not available. Although most Texas banks accept IOLTA

accounts for a variety of reasons,[2] they are not obligated to do so.

The simple economic reality is that money placed in a non-IOLTA account will yield interest income only if the associated costs are less than the interest earned; no bank would permit its depositors to take the interest and principal out of an account without a reckoning of the expenses. Even if IOLTA were repealed, banks still would receive *all* of the net benefit where costs exceed the interest, just as banks did before the advent of NOW accounts, and just as banks would continue to do for corporate deposits.[3] Unless Respondents believe that the Government's decision to forbid the payment of interest on demand accounts (prior to NOW), or the decision to exclude for-profit corporations from using NOW accounts today constitute "takings," it is difficult to understand where Respondents' argument could lead them.

Nonetheless, Summers, undaunted by economic reality, contends that, in determining whether he has lost any property rights, the Court should disregard all of the costs associated with earning interest on his deposit and ask only whether there were earnings that might have been paid to Summers. Summers apparently recognizes that, prior to NOW accounts, and even today in the absence of a bank which offers low-cost sub-accounting, he and other clients would receive nothing, yet he insists,

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[2] For example, banks are subject to a series of federal regulations – not challenged here – that encourage participation in programs like IOLTA. *See* 12 U.S.C. § 2901, *et seq.* (1989); 12 C.F.R. § 228 (1997). Moreover, banks use IOLTA to attract other business from lawyers. And, even with the interest paid in IOLTA accounts, banks still realize a net profit from these deposits.

[3] Corporations are prohibited under federal banking law from maintaining NOW accounts. Pet. Br. at 5.

because someone else (IOLTA) actually was paid the interest earned on his share of the principal amount in the IOLTA account, he has been deprived of his property in violation of the Constitution (Resp. Br. at 33). That argument simply makes no sense.[4] Indeed, if it were adopted, every depositor could sue their bank if the bank put its profits to a use to which the depositor objected.

Property is a meaningful right only if it can be exercised. Here, Summers asks the Court to disregard the fact that he would never receive a penny, but never answers the question of what "property" has been taken from him as a result of IOLTA. While IOLTA did not create these external costs, somehow, in Summers' constitutional calculus, he feels entitled to disregard them.

His answer seems to be that here the bank is actually paying out "interest," whereas prior to IOLTA it was not paid out at all (Resp. Br. at 35). Aside from the complete lack of authority for this proposition, his concept of payment focuses the inquiry much too narrowly. Although what the bank earned on a non-IOLTA account (either prior to NOW accounts or in a situation in which no net earnings would accrue to the depositor) would not be paid out with a label "interest," the benefits would inure to the bank and its stockholders. The "interest" would benefit someone other than Mr. Summers, and yet he makes no claim that there would be a deprivation of his property or that he would have any right to the money

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[4] Respondents' brief never addresses the question, if Mr. Summers were "entitled" to the gross interest earned on his deposit, who besides Mr. Summers would pay the associated costs? Indeed, Respondents' own resort to the Austrian understanding of "interest" in the nineteenth century confirms that "lender's" concern in recent centuries has been with the ability to derive "permanent *net* income." Resp. Br. at 16 (quoting Eugene von Bohm-Bawerk, *Capital and Interest* (Huncke & Sennhols trans. ed., 1959).

under the common law of property based on the proposition that interest always follows principal. Thus, as an economic concept of property, Summers' position has no basis in objective rules or customs that could be perceived as reasonable.

2. Summers has shown no legal basis for his expectation to own interest without regard to costs.

The law does not help Summers either. To be sure, there is little law on this issue, almost certainly because it is difficult to imagine the issue arising in a typical takings case. Nonetheless, what law there is supports Petitioners, not Respondents.

For example, in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) the Court accepted the right of the State to impose approximately $10,000 in administrative costs for holding the principal amount for the benefit of the creditors, but held that the interest earned *after* those expenses could not be kept by the State. Under Respondents' theory of interest following principal, with all costs disregarded, the State in *Webb's* could not have kept any of the money, even to offset legitimate expenses that it incurred. The creditors in *Webb's* were not awarded that $10,000 because the court recognized the cost of earning the interest.

Nonetheless, Respondent Summers' claimed property right hinges on *Webb's* and the assumption that it creates a property right for anyone who has a claim to principal where interest is paid, regardless of whether the person could have earned the interest himself or had any expectation to interest in excess of costs. Of course, *Webb's* does not state any such rule and no other authority supports the notion that Respondent Summers has any reasonable expectation to IOLTA interest.

The one Texas case relied upon by the Fifth Circuit panel, *Sellers v. Harris County*, 483 S.W.2d 242 (1972), is

equally clear in its holding that property rights do not exist in isolation from associated costs. The Texas Supreme Court was justifiably outraged by a statue that took $6,000 per month in interest on interpleaded insurance proceeds, and held that the statute's operation constituted a "taking" of the claimants' property. In its specific holding, however, the Texas Supreme Court made a critical distinction, stating that "[b]y depriving the owner of a sum *not reasonably related to the value of the county's services in safeguarding and investing the principal*, the statute offends Article 1, Section 19 of the Texas Constitution as well as the Fourteenth Amendment of the United States Constitution." *Id.* at 244 (emphasis added). Notably, the court did not suggest, as Respondents must argue here, the claimants would own the interest even if they could never reasonably expect to receive any net interest. Nor did the court hold, as a matter of property law, that all of the interest earned in the commingled general accounts belonged to each potential claimant, even if the claimant's funds could not have earned net interest on its own.[5]

The Texas IOLTA program is fundamentally different from the interpleader statues at issue in *Webb's* and *Sellers*. For one thing, the only funds that qualify for IOLTA treatment are those that could not earn net interest (defined as real income after deducting costs of "safeguarding and investing the principal") on their own. IOLTA reduces administrative and accounting costs in

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[5] Moreover, even if one generously assumed (as Respondents claim) that *Sellers* adopted a universal rule that "interest follows principal," that rule is hardly so ingrained that it could not be modified by the same court. The Texas Supreme Court's judgment that IOLTA's application to deposits that could not earn net interest is not only entitled to deference, it is also consistent with the expectations of Texas clients. *See* Brief of Conference of Chief Justices, at 5.

cases where net interest could not be earned for individual clients. The funds in *Webb's* and *Sellers* clearly could (and did) earn net interest, and it would have been a violation of IOLTA standards if an attorney ever had placed such funds in an IOLTA account.

In short, economic and banking realities are key to IOLTA as the same Texas Supreme Court that decided *Sellers* concluded in enacting it. Contrary to the views of the Fifth Circuit panel, Texas did not rely on "alchemy" (Pet. App. 7a) to produce net income from IOLTA, but rather on "efficiency" or "economies of scale" resulting from the pooling of accounts and elimination of the need to pay the costs of attributing interest to each client in the pool.

Another crucial difference between *Webb's*, *Sellers*, and this case is obvious when one examines the underlying trust obligations. In both *Webb's* and *Sellers*, state agents (court clerks) were acting as fiduciaries for funds owned by private litigants. *See, e.g., Sellers*, 483 S.W.2d at 243 ("these funds . . . are only held in trust for the litigant"). At the same time, however, the State was taking *net* interest earned on those funds and appropriating it to its own uses. This would be considered a breach of fiduciary duty and of legitimate expectations.

In this situation, however, the trust relationship runs between attorney and client. IOLTA requires only that an attorney substitute one type of non-interest bearing account for another, when interest cannot productively be earned for the client. An attorney who follows IOLTA rules violates no fiduciary obligation recognized by *Webb's* or *Sellers*, and infringes no legitimate client rights or expectations.

Texas law, the primary source for any historical expectation Respondent Summers might have to ownership over IOLTA proceeds, also does little to advance his claim. Contrary to the approach taken by the Fifth Circuit panel, the inquiry into Texas law does not begin and end

with *Sellers*. The historical right to collect interest in Texas is, in the words of the State's highest criminal court, "a creature of statute, not an inherent right." *Juhan v. State*, 216 S.W. 873, 874 (Tex. Crim. App. 1918). It exists as a result of its recognition by law or by an agreement between the parties. Texas law, including the Texas Constitution, has long regulated agreements that call for payment of interest. *E.g.*, Forrest M. Smith, *The Regulation of Interest; Practice and Procedure*, 10 St. Mary's L.J. 825, 829-33 (1979); TEX. CONST. art. XVI, § 11; *see also Texas Land & Mortg. Co. v. Mullican*, 132 F.2d 241, 242 (5th Cir. 1943) (calling Texas' regulation of interest "strict"). Moreover, in looking to Texas law deference should be made to the administrative orders of the Texas Supreme Court regarding the Texas IOLTA Program, as well as the IOLTA rules themselves, as a source of Texas law dealing with rights in the context of client trust accounts. (Cert. Pet. App. at 56a; Pet. Brief at 9).

Respondents, however, insist they have discovered a universal common-law rule of Texas property law that was somehow violated by the Texas Supreme Court when it implemented IOLTA. The truth of the matter is that Texas law recognizes a general rule that interest is permitted – provided the rate is not usurious – if it is *"allowed by law* or *fixed by the parties."* *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985); *see also Smiley v. Citibank*, 116 S. Ct. 1730, 1735 (1996) (employing identical definition). Interest thus does not "follow principal" invariably under Texas law, as the rules regarding income-only trusts and community property demonstrate.[6] The expectations a Texas client might

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[6] Respondents' efforts to explain away these rules are unavailing. Texas community property rules provide that all of the spouse's interest on separate funds is property of the community from its inception and may be turned over to the

have to interest stem from rules that required – and after IOLTA still require – any interest that can be earned for his benefit be turned over to the client, not from a simple catch phrase.[7] The notion that interest earned in an IOLTA account the instant before service charges are deducted or interest paid to TEAJF, is the "property" of each of the clients whose funds have been aggregated, is absurd as a matter of law and common sense.

Further support for Texas' position can be found in the law of damages in takings cases generally, where the government must pay only the value of what the property owner lost, not the value of the property in the hands of the government. Brief of the United States at 20-22. Thus, where the property can be put to a more valuable use by the government (for example, because it has become part of a larger parcel or because existing zoning restrictions are eliminated), the former owner is

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other spouse upon divorce. Pet. Br. at 22. While Respondents urge – with no supporting citation – this is merely evidence of some implied agreement between the spouses, it is not. Rather, it is a result of a Texas statute that so mandates, notwithstanding the supposed inviolate rule that "interest follows principal." *Id.* at 22-23. In the case of the income-only trust, Respondents urge that this shows only that the trust agreement can separate interest and principal. This, however, is precisely the point. Interest follows principal only if the parties have so provided or if Texas law compels it, not because interest is an inalienable property right that cannot be divorced from title to principal.

[7] In fact, where a transaction includes a deposit to secure a service, there is normally no reasonable expectation to interest income in the absence of some agreement to that effect. If, for example, a hotel required a $100 deposit to hold a room, a traveler who canceled his reservation and received a refund would not reasonably expect to also receive "his share" of the interest the hotel received on the use of his funds in the meanwhile (especially where the costs would exceed that amount).

not entitled to receive any of the new value, on the theory that it was added by the government and not taken from the prior owner. Similarly, if the Government permitted low, but noiseless, flights over a property owner's beautiful garden, there would be a taking only if the owner lost something, not just because the viewer gained something. In short, Respondents' theory, which disregards what the client lost and focuses instead on what IOLTA gained, is wholly inconsistent with this aspect of the law of takings.[8]

According to Respondents' theory, Summers must be given a constitutional windfall, by becoming entitled to receive, or at least to prevent others from receiving, the benefit of earning interest that, because of the laws of Texas and the United States (both banking and tax), as well as the laws of economics, he would never have received. We know of no constitutional doctrine, whether part of the jurisprudence of the Takings Clause or the Due Process Clause, that would compel, or even permit, such a bizarre result. Respondents' attempts to take the sweet without the bitter (interest without the associated costs of producing and delivering it) must be rejected.

B. The Record Conclusively Establishes That Neither Summers Nor Any Other Texas Client Has Had Net Interest Taken By The Texas IOLTA Program.

Finally, on page 36 of their brief, Respondents reach their fallback point: even if net interest is the proper focus, they still win because "[e]vidence in the record indicates that, virtually always, clients benefit if their

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[8] In the bankruptcy context, this Court recently recognized the need to take into account offsets comparable to the costs of earning interest. *Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879, 1886 n.6 (1997).

trust funds are deposited into interest bearing non-IOLTA accounts." The problem for Respondents is that neither their citation to pages 98-99 of the Joint Appendix, or anything else in the record supports that conclusion.

We start at the beginning, with the complaint (J.A. 2-17), which is not a class complaint, but an individual one brought on behalf of WLF, attorney Mazzone, and client Summers. Only Respondent Summers has any arguable property right at stake. Since this is an individual action, it is only the impact of IOLTA on his funds, not on those of "virtually" every client on which this case must be judged. His complaint never alleges he would have earned net interest. In fact, in paragraph 36 (J.A. 12), he admits his own attorney told him that it would not earn net income if kept in a separate account. That concession ought to end the inquiry.

But there is more. After Petitioners' motions to dismiss were denied, the parties both moved for summary judgment. Thus, contrary to Respondents' suggestion (Resp. Br. at 37), this is hardly a case, like *Eastman Kodak*, where summary judgment is entered against a party who is complaining that discovery is incomplete.

Petitioners have established IOLTA only applies to those client trust funds that, after taking into account all proper charges, could not produce net income for the client. The most crucial affidavit was that of Respondent Summers, consisting of just nine numbered paragraphs and no exhibits. The only statement that bears on the factual issue of whether Summers' money could have earned interest for him, after paying associated expenses, is paragraph 6. In the final part of the second sentence, he describes the possibility of having his lawyer deposit his money in a separate account as "an infeasible option

because the cost of establishing and administering a separate account for my funds most likely would exceed any interest that could be earned on those funds." J.A. 86.[9]

Most significantly, there is *no* evidence, any place in the record, to show that if Summers' funds were deposited in a non-IOLTA account they would have produced net income to him. Mazzone himself testified that funds that are nominal in amount or held for a short term "cannot practically be placed into separate interest-bearing accounts, because the additional costs of establishing and maintaining such accounts usually would exceed any interest I could earn for my clients." J.A. 83, ¶ 4. Given that state of the record, it was not surprising that the district court also concluded that Summers had lost no net interest and therefore had no constitutional claim. Indeed, with cross-motions for summary judgment and with no request for additional discovery on this issue, the trial court had no choice but to enter summary judgment for Petitioners. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In this Court, Respondents rely heavily on the affidavit of Robert J. Randell (J.A. 94-105), who is alleged to be a banking expert and who claims that interest can be earned on most accounts through the device of sub-accounting, particularly given the capabilities of modern computers. Despite its seeming relevance, reliance on the Randell affidavit is doubly flawed. Just as this Court found similar affidavits offered to avoid summary judgment to be inadequate in *Lujan v. Defenders of Wildlife*, 504

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[9] The Fifth Circuit panel took the position that the costs of complying with the mandatory reporting provisions of the "fickle tax code" (Pet. App. 16a-17a, n.47) were irrelevant. The Internal Revenue Code may or may not be fickle, but the obligations it creates cannot be ignored, and if they impose costs on someone, those costs must be paid (or absorbed) and are not to be ignored in determining whether deposits of a client produce net income.

U.S. 555 (1992), and *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990). Randell's affidavit also fails to make the necessary connection to the facts of this case.

First, the Randell affidavit does not mention Mr. Summers or his deposits, nor does it attempt to show how any plaintiff in this case was injured by the Texas IOLTA program by being deprived of net income which he otherwise would have earned from his trust fund deposit. Second, all of his discussion and his examples are from New York and New Jersey, not Texas where this case arises. Randell may or may not be correct about what happens elsewhere, but this case involves the Texas IOLTA program, and he fails even to assert that the results he claims for New York would obtain in Texas. There was, therefore, no point in challenging Randell's assertions because they had nothing to do with this case, which involved one client in one state. Had Congress or a federal agency been considering this issue, they might have explored the ramifications of Randell's general assertions, but a district court in Texas, passing on a specific case dealing with a Texas client and Texas banks, would have committed error had it relied on such general claims as made by Mr. Randell.

Furthermore, nowhere in the record is there any evidence as to the exact amount of Mr. Summers' deposit – it is described in the complaint as a "small amount" (J.A. 12, ¶ 7) and in his affidavit as "a small retainer fee" (J.A. 86, ¶ 4). Nor does the record show how long the money was actually held by his attorney so that the Court, Petitioners, or even Mr. Randell could calculate approximately how much interest might have been earned and what the costs might have been. Thus, on this record, even if one wanted to attempt to determine whether Mr. Summers' money might have earned net interest while held by his counsel, it would be impossible because even

the most basic data is lacking, despite the fact Respondents moved for summary judgment themselves.[10]

The Fifth Circuit panel never analyzed the case in this manner, but that may be partially due to the fact that this case was not structured as a typical takings case in which one or more plaintiffs sues for money damage for a specific loss from a specific governmental taking of a specific piece of property. The relief sought here is principally prospective, designed to shut down the IOLTA program as a whole, and not just to prevent future takings of interest on money deposited by Mr. Summers with his lawyers. There is a claim for a refund of money damages, but that was rejected on Eleventh Amendment grounds by both lower courts, and this Court denied certiorari on the question. (Cert. Pet. App. pp. 17-18; 37-38).[11]

Leaving aside the question of whether an injunctive action may ever be brought to remedy a claim of taking

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[10] Mr. Summers' real dispute may be with his lawyer, not with IOLTA. His affidavit indicates that the deposit was intended to be used if he failed to pay his legal bills, rather like a tenant's rent escrow, and that it may still be on deposit (J.A. 85-86 ¶ 3). If that is the case, his lawyers probably should not have put his money in an IOLTA account. However, that is not a loss for which Petitioners are responsible.

Nor is there anything to Respondents' assertion that IOLTA rules preclude, or even appear to preclude, attorneys from using sub-accounts where their use could result in net interest being earned by their clients. There is no support in this record for any claim that any official pronouncement or rule of Petitioners operated in that manner, or even was a factor in any attorney not using a sub-account. Moreover, the only arguably relevant fact in this case is whether any attorney used by Mr. Summers was misled in that regard. On that point, there is not even a shred of evidence to support such a claim.

[11] Curiously, Respondents' prayer for relief (J.A. at 16) demands a refund for "Plaintiffs' money" even though the only money in this case belongs to plaintiff Summers.

without just compensation,[12] if this case had been brought as a traditional takings claim, all of the efforts to avoid the issue of whether Mr. Summers had any amount of net interest taken from him would have been exposed. Surely, in such a case, he could never have sought summary judgment without submitting basic data about the alleged taking, and surely no Texas court would have paid the slightest attention to the Randell affidavit, unless it made some effort to connect its general assertions to the facts of this case or at least to Texas banking practices generally. And equally certain, although Respondents have attempted to camouflage this as a Section 1983 case that cannot negate their obligation to support their claim with factual evidence needed to determine whether any of Mr. Summers' property was actually taken. Plainly, a party who cross-moves for summary judgment without adequate supporting factual evidence, and who fails to contend that the record needed more development before the Court could decide the motions, cannot subsequently object to that record. *See Celotex*, 477 U.S. at 323-26. And on this record, the district court was clearly correct in entering summary judgment for Petitioners.

* * *

Much as Respondents might wish otherwise, the federal courts do not have a roving commission to rummage through IOLTA's rules and practices to find parts that might violate the Constitution. Rather, it is the duty of federal courts to examine the claims of the parties before them, sift the evidence presented by them, and determine whether any of the rights asserted have been violated.

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[12] *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("[e]quitable relief is not available to enjoin an alleged taking of private property for a public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking") (footnote omitted).

Respondents have not shown any cognizable property right. Indeed, the record in this case is crystal clear no property interest of any of the three plaintiffs has been violated at all, let alone by Petitioners or the Texas IOLTA program. The district court correctly understood no property right was infringed by the Texas IOLTA program. In contrast, the Fifth Circuit panel failed to moor its ruling to the facts, as cabined by the laws governing bank accounts and those establishing reporting obligations under the Internal Revenue Code. Because none of the Respondents has suffered any injury to their property, the judgment of the Fifth Circuit should be reversed, with directions to reinstate the judgment of the district court in favor of Petitioners.

Respectfully submitted,

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